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BUSINESS AND HUMAN RIGHTS SYMPOSIUM

Giving Human Rights a Future

The Transnational and Transformative Character of a Business and Human Rights Treaty

NINA REINERS — 27 July, 2018



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The future of human rights, as scholars and practitioners alike emphasize, depends on its ability to address economic inequality. For this aim, human rights lawmaking needs to listen to more voices than just the ones of the powerful states and the human rights movement needs to include more actors than it did in the past to tackle questions of fair distribution: “While inequality on grounds such as gender, race and disability have long been core human rights concerns, gross inequalities in economic status remain largely unchallenged by human rights law and advocacy”.

A treaty on business and human rights would be a step in the right

direction: While it undoubtedly raises fundamental questions for international law and its subjects, it possesses a transnational and transformative character and reflects the changing reality for human rights. What is meant by that? I argue that the development towards a legally binding instrument constitutes a prime example of how non-state actors can initiate and influence lawmaking at the international level and work towards more economic fairness. The *de jure* role of civil society, business actors and other sub- and non-state actors does not at all reflect their *de facto* role for international human rights law. Should the current working group, as established by the Human Rights Council in 2014, be able to deliver on its promise – a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises – then this outcome can be seen as one that followed a transnational advocacy process. With the support of this movement, so my thesis, human rights can once again demonstrate its transformative power.

Transnational Actors for Business and Human Rights

Although the name emphasizes that it is an “intergovernmental” working group (IGWG), a closer look at who is involved in the process reveals a different reality. Holding transnational corporations accountable for human rights has been a demand of human rights defenders worldwide. First global efforts started in the 1970s to come up with binding rules for corporate governance. From the voluntary United Nations Global Compact to the establishment of the mandate of a UN Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises and his presentation of the Guiding Principles on Business and Human Rights: the UN took action, but, in the view of civil society actors, not enough. From their point of view, the Guiding Principles were a first step but one that should ultimately lead to a legally binding treaty. A network of civil society organizations strategically lobbied state delegates to convince them to take action, informed the public about corporate violations of human rights to create publicity and support, monitored the power balances in the Human Rights Council to identify a window of opportunity and finally published a joint statement in 2013 which called for a legally binding instrument and to this end proposed the establishment of the IGWG. These calls eventually led to Human Rights Council Resolution 26/9.

The civil society network, the Treaty Alliance, currently consists of 985 organizations and 1476 individuals who signed the joint statement

calling on States to actively participate in the treaty negotiations. By organizing an action week during the meetings of the IGWG, coordinating national treaty alliances, providing draft letters to governments and using social media to inform about activities and developments, the Treaty Alliance applies multiple strategies for its advocacy work which target different levels and actors. The network and other initiatives supporting the treaty also reflect the cross-sectional moment of the treaty alliance: it is not only made up of human rights organizations, a critique brought against human rights advocacy in the past, but actors from the fields of environment and climate protection, economic equality and tax regulation. The International Trade Union Confederation (ITUC) adds a powerful voice and criticizes business representatives who try to block progress in the IGWG.

A binding treaty is gaining transnational support beyond civil society. The platform www.bindingtreaty.org represents a global network of political representatives who advocate for an effective international legally binding treaty on transnational corporations with respect to human rights. Almost 300 representatives of national parliaments have signed the statute calling for governments to support the treaty which they expect to balance the unfair consequences of unregulated globalization. Furthermore, a survey in 2014 found that 20% of global business executives are in favor of a legally binding treaty and several companies and business enterprises present proposals for the treaty and show commitment to the process of the IGWG.

Beyond actors from civil society, the private sector and governments, such a treaty finds support in other UN human rights institutions. The treaty bodies to the Human Rights Covenants, especially the Committee on Economic, Social and Cultural Rights, have taken up the issue of state responsibility for human rights abuses by corporations in their dialogues with state parties and recently adopted a General Comment on that matter (read more on the GC [here](#)). Even the UN Secretary General's Special Representative for Business and Human Rights John Ruggie, a strong opponent of a binding treaty in the past, opened up towards the idea of a legally binding treaty lately. The election of the former chairperson of the IGWG, María Fernanda Espinosa Garcés, as the new president of the General Assembly puts a tireless advocate of the binding treaty in the center of the UN member states.

States in Support and Resistance – the Economic Divide

A legally binding treaty on business and human rights would represent the demands of the Non-Western states which initiated the IGWG and put their interests at the core of multilateral decision-making. Ecuador and South Africa had been at the forefront of the initiative and sponsored the UN Human Rights Council resolution 26/9 establishing the Working Group. The 20 votes in favor of the resolution in the Human Rights Council represent countries of the Global South as well as those countries with the highest populations, like China and India. Unsurprisingly, the resolution was opposed by EU countries and other industrialized nations, like Japan and the United States. Economic interests seem to outweigh human rights development. The binding treaty could counter voices arguing for human rights as an imperialistic idea of the West and instead be seen as an instrument which protects the powerless instead of the wealthy Western states.

The resistance of many states and business actors towards a legally binding treaty remains. Not all of the motifs for this resistance, however, present unsurmountable obstacles. Questions of extraterritorial obligations (for more on this issue see here), the scope of responsibility for corporations and the relationship with other human rights treaties will have to be discussed in the IGWG and a compromise eventually found. If the transnational network keeps the pressure high from above and below, thus at the international and the domestic level, their advocacy work is likely to result in states' commitment to the treaty. Furthermore, academia, think tanks and political foundations present research on human rights violations by corporate actors and data material which supports arguments for this treaty in the public discourse. Even the decision of the USA leaving the Human Rights Council does not discourage the transnational community but is seen as an opportunity to make real progress with a binding treaty which the USA actively opposed.

The future of human rights, as it is argued, is connected to their ability to address economic inequality and this connection has not been properly addressed in the past. In the case of business and human rights, we can already observe the emergence of a "new" human rights movement: a transnational coalition of actors from civil society, business, unions and governments joining forces for a legally binding instrument. Governments, especially the ones of the wealthier states, now have the unique opportunity to acknowledge and transform the power structures established by transnational corporations and other business enterprises, hold them accountable for their human rights violations under international law and clarify that private actors have

rights and duties when seeking profit in global trade.

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